The Swiss vote against mass immigration and international law: A preliminary assessment

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On 9 February 2014, the Swiss population adopted a popular initiative aimed at stopping mass immigration. Though the text was adopted by a very slim majority of 50.34 per cent, the consequences of the new constitutional provisions are straightforward. They require that immigration be restricted by means of quantitative limits and quotas.

The wording of the new Article 121a of the Swiss Constitution is both vague and wide-ranging. Immigration quotas will apply to "any permission to remain delivered in accordance with the law on foreign nationals, including asylum" as well as "cross-border commuters".[2] The quotas must be based on "the overall economic interests of Switzerland with due respect for the national preference" for Swiss citizens.[3] Article 121a of the Constitution further requires that "no international treaty contrary to this article will be concluded", while existing treaties "shall be renegotiated and adapted within the time-limit of three years".

For the time being, the new constitutional provisions are not directly applicable.[4] They entail the adoption of a new legislation for the purpose of implementing them. Although the devil is in the detail, measures of implementation will be crucial for specifying the exact scope and limits of immigration quotas.

The purpose of this article is to identify which treaties are in contradiction with the new Article 121a of the Swiss Constitution. Though this survey is not exhaustive, no fewer than 58 treaties appear to be incompatible with immigration quotas. While covering various fields of international law and relations, these treaties mainly concern three key areas: headquarter agreements concluded with international organizations; conventions governing refugee protection; and treaties on the free movement of persons concluded with the European Union and the European Free Trade Association (EFTA).

Of course, it is premature to conclude that Switzerland has violated these treaties since the new constitutional provisions require renegotiating and adapting them. It must be noted, however, that Switzerland's margin for manoeuvring is particularly thin and such negotiations are bound to be extremely difficult. In any event, according to the law of treaties, Switzerland cannot unilaterally revise or terminate a treaty except where this is provided for by the treaty in question and, in the absence of such possibility, any amendment must be approved by all States party to the treaty.[5] The following sections examine which treaties are contrary to immigration quotas and assess the different options for the Swiss authorities.

Introducing immigration quotas is contrary to all agreements concluded between Switzerland and international organizations

The Agreement on Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the UN Secretary-General on 19 April 1946, explicitly excludes any kind of immigration restrictions. According to Article V Section 15(d) of the Agreement, "Officials of the United Nations shall […] be immune, together with their spouses and relatives dependent on them, from immigration restriction and

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2 This is a free translation of the author based on the French version of the new constitutional text.

3 Article 121a adds that the criteria for granting permissions to remain notably include a request from an employer, the integration capacity of foreigners, and a sufficient and independent source of income.

4 The only exception concerns the prohibition of concluding new treaties which are in contradiction with Article 121a. Few days after the vote, Switzerland has refused to sign the Protocol on Free Movement with Croatia.

5 Article 54 of the Vienna Convention on the Law of Treaties. This does not prejudice the obligations of States under international customary law. For an overview, see: V. Chetail, "The transnational movement of persons under general international law: Mapping the customary law foundations of international migration law", in: *Research Handbook on International Law and Migration* (V. Chetail and C. Bauloz (eds.)) (Cheltenham, Edward Elgar Publishing, 2014), pp. 1–74.

alien registration."[6] This clause was restated in the Convention on the Privileges and Immunities of the Specialized Agencies adopted on 21 November 1947.[7]

Furthermore, most UN agencies hosted by Switzerland have concluded headquarter agreements for the same purpose. This notably concerns the International Labour Organization (ILO), the World Meteorological Organization (WMO), the World Health Organization (WHO), the International Bureau of Education (a UNESCO institute) and the World Intellectual Property Organization (WIPO). These agreements recall that "the Swiss Authorities will adopt all measures necessary to facilitate the entry onto Swiss territory, the sojourn on this territory and the exit therefrom of all persons called upon in an official capacity." They further specify that "all measures […] aimed at restricting the entry into Switzerland of foreigners, or of controlling the conditions of their stay, will not be applicable."[8]

This clear-cut exemption from immigration quotas is not limited to UN agencies. The same provisions can be found in many agreements concluded with a broad variety of key actors, including the World Trade Organization, the International Committee of the Red Cross, the International Olympic Committee, the Bank for International Settlements, the Inter-Parliamentary Union, the European Organization for Nuclear Research (CERN) and the Geneva International Centre for Humanitarian Demining.[9] Besides international institutions hosted by Switzerland, a similar exemption from immigration restriction applies to officials of many other organizations, such as the Council of Europe, the European Patent Organization and the Asian Development Bank.[10]

Overall, Switzerland has concluded 53 agreements with international organizations and other related bodies for the purpose of exempting their staff from quotas and immigration restrictions. Against such substantial number of treaties, Switzerland has only two alternatives:

- **Option 1: The less probable option would be to renegotiate all these agreements.**

Such a course of action is still legally possible and even foreseen in most of these agreements. For instance, the 1946 Agreement on Privileges and Immunities of the United Nations provides that it can be modified only by agreement between the Secretary-General and the Swiss Federal Council. If agreement cannot be reached, the Secretary-General or the Swiss Federal Council may denounce the whole of, or any section in, this treaty.

However, such eventuality would be particularly time-consuming and cost-intensive. Perhaps more importantly, it would drastically undermine the attractiveness and credibility of Switzerland as a host country of international organizations.

- **Option 2: The more probable option would be to interpret the new constitutional provisions as excluding these agreements from immigration quotas.**

Indeed, according to the text of the new Article 121a, immigration quotas will be applicable to "any permission to remain delivered in accordance with the law on foreign nationals." However, residence permission for officials of international organizations is not granted by virtue of the law on foreign nationals. Instead, they have been excluded from any rules or

6 SR 0.192.120.1. This agreement applies by analogy to the Universal Postal Union and to the International Organization for Migration. The same clause has been inserted in other agreements concluded with the International Telecommunication Union, the Intergovernmental Organization for International Carriage by Rail, and the International Federation of Red Cross and Red Crescent Societies.

7 Article V, Section 13(d), and Article VI, Section 19(e), 33 UNTS 261.

8 Agreement between the Swiss Federal Council and the World Meteorological Organization to govern the legal status of this Organization in Switzerland, Article 14. See also the similar agreements concluded with ILO (SR 0.192.120.282), UNESCO (SR 0.192.120.241), WHO (SR 0.192.120.281), WMO (SR 0.192.120.242) and WIPO (SR 0.192.122.23).

9 A similar provision can be found in other agreements concluded with the following institutions: Advisory Centre on WTO Law; the OSCE Court of Conciliation and Arbitration; Centre Sud; Global Alliance for Vaccines and Immunization Advisory; International Civil Defence Organization; International Union for the Protection of New Varieties of Plants.

10 This also concerns the African Development Bank, the Organization for the Exploitation of Meteorological Satellites, the European Organization for Astronomical Research in the Southern Hemisphere, the European Centre for Medium-Range Weather Forecasts, the Organization for the Prohibition of Chemical Weapons, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the International Criminal Court, INTELSAT, the European Telecommunications Satellite Organization, the International Mobile Satellite Organization, the Common Fund for Commodities, the Inter-American Development Bank and the International Atomic Energy Agency.

measures based on the Swiss legislation on foreigners. They are thus not covered by the new constitutional provisions. This literal interpretation of Article 121a should be confirmed by the Swiss authorities in order to avoid any ambiguity about the scope and the limits of immigration quotas.

Introducing immigration quotas is contrary to the Geneva Convention relating to the Status of Refugees, the United Nations Convention against Torture and the European Convention on Human Rights

While Article 121a of the Swiss Constitution says nothing about officials of international organizations, it explicitly includes asylum within the scope of immigration quotas. The new constitutional provision thus mixes up economic migrants with refugees in blatant contradiction with the United Nations Convention relating to the Status of Refugees.

Granting asylum depends on the need for protection and cannot be subordinated to economic considerations. The self-declared objective to exclude so-called economic refugees is all but convincing.[11] In fact, this would generate the exact opposite result since introducing quotas based on the economic interests of Switzerland would attract "economic refugees" at the detriment of "real refugees" in need of protection.

In any event, the new constitutional provisions cannot relieve Switzerland of its obligations arising from the principle of non-refoulement, which prohibits removing an individual to a country of persecution, torture, or inhuman or degrading treatment. This cardinal principle of refugee protection is based on Article 33 of the Geneva Convention, and reinforced by Article 3 of the United Nations Convention against Torture and the European Convention on Human Rights as interpreted by the European Court.

The principle of non-refoulement is further endorsed by Article 25 of the Swiss Constitution, and this basic guarantee remains plainly applicable since the new constitutional provisions have not superseded it. Furthermore, the principle of non-refoulement has been acknowledged by the Federal Council as a peremptory norm of general international law[12] and, according to the Swiss Constitution, peremptory norms cannot be violated by a popular initiative aimed at revising the Constitution.[13]

Against this legal framework, immigration quotas introduced by Article 121a of the Swiss Constitution are inapplicable to foreigners who suffer persecution, torture, or cruel, inhuman or degrading treatment in their own countries. As a result, the new constitutional provisions can only be applied in very specific circumstances, that is, when there is no risk of persecution or other related mistreatment but the removal is still impossible for other reasons (such as material obstacle or health considerations). Even in such cases, it is difficult to see how immigration quotas can be implemented and in particular to what extent the economic interest of Switzerland can be accommodated with the existing legislation governing temporary admission.

One possible way of implementing the new constitutional provisions would be to introduce quotas for refugees who are not in Switzerland. Such resettlement schemes are implemented by several host countries in the European Union. Quite ironically, the possibility of requesting asylum abroad at a diplomatic mission has been suppressed by a popular vote in June 2013.[14] But here again, even if such a possibility is reintroduced in the Swiss legislation, this begs the question how economic considerations can be balanced with the need for protection for the purpose of implementing quotas.

11 *Argumentaire : initiative populaire »contre l'immigration de masse »* (Comité Interpartis Contre L'immigration de Masse, 17 December 2013), p. 40.

12 Federal Council, Message concernant les initiatives populaires « pour une politique d'asile raisonnable » et « contre l'immigration clandestine », 22 June 1994, FF 1994 III 1471, p. 1486 ; Message relatif à une nouvelle constitution fédérale, 20 Novembre 1996, FF 1997 I 369, pp. 441–454 ; Message relatif à l'initiative populaire « contre l'immigration de masse », 7 December 2012, FF 2013 279, p. 287.

13 Article 194(2) of the Swiss Constitution. See also Article 139(3) and Article 193(4).

14 Federal Act of 28 September 2012 (Emergency Amendments to the Asylum Act), with effect from 29 September 2012 to 28 September 2015 (AS 2012 5359; BBl 2010 4455, 2011 7325).

Introducing immigration quotas is contrary to the Agreements on the Free Movement of Persons concluded with the European Community and the European Free Trade Association

The impact of the new constitutional provisions on these two agreements is the most complex issue. EU and EFTA citizens represent indeed around 66 per cent of the total population of foreigners in Switzerland.[15]

Both agreements lay down transitional measures during which immigration can be restricted in two different manners. During the first transition period, limitations for access to the labour market (including priority to nationals and quotas for non-nationals) were possible up to 30 April 2011. Then, during a further three-year period, the safeguard clause could be invoked for the purpose of reintroducing quotas. According to this clause, Switzerland could unilaterally limit the number of new residence permits for employed and self-employed EU citizens to the average of the three preceding years plus 5 per cent.[16] This possibility was used twice in 2012 and 2013 by the Federal Council,[17] with this transitional period set to end by 31 May 2014.[18]

It is not difficult to see that the very purpose of the popular vote is to block the full realization of free movement once the transitional period is over. Swiss authorities have thus hardly any alternatives:

- **Option 1: The new constitutional provisions could still be construed as excluding the free movement agreements from their scope.**

Though this option has not been discussed so far, nothing in the text of Article 121a explicitly includes EU citizens within the scope of immigration quota. It is true, however, that the new constitutional provisions are broad and inclusive as quotas concern "any permission to remain" and they include "cross-border commuters".

One could however argue that, as a matter of principle, the Swiss Constitution must be interpreted in conformity with international law. Furthermore, the Swiss Federal Act on Foreign Nationals states that it applies to non-nationals "provided no other provisions of the federal law or international treaties concluded by Switzerland apply" (Article 2(1)). Article 2 further confirms that it applies only to the extent that the agreements on free movement concluded with the European Community and the EFTA do not contain any different provisions.

Following this stance, immigration quotas would be limited to persons who are not citizens from Member States of the European Union and of the EFTA. Of course, such interpretation will be criticized as neutralizing the popular vote for the very purpose of maintaining the current applicable legislation. On the other hand, one could reply that this was the price to pay for having submitted to a vote a particularly ambiguous text that has been finally approved by a very slim majority.

- **Option 2: The second alternative would be to renegotiate the free movement agreements in order to maintain the safeguard clause, whether for an additional period of transition or as a permanent mechanism.**

The possibility of requesting a revision is explicitly provided by Article 18 of the bilateral agreement. However, negotiation will not be easy. It largely depends on the goodwill of the European Union since it is not obliged to accept an amendment in contradiction with existing treaties. The bargaining power of Switzerland is further undermined by its economic dependence vis-à-vis the European Union: around 60 per cent of Swiss exports are done with EU Member States.[19]

15 Statistique des étrangers à fin Décembre 2013 (Federal Office for Migration, 2013).

16 According to Article 10(4) of the bilateral agreement, the safeguard clause can be used only if the number of residence permits in a given year exceeds the average for the three preceding years by more than 10 per cent.

17 RO 2012 2391; RO 2013 1247; RO 2013 1443.

18 For Bulgaria and Romania, which joined the European Union in 2007, the first transitional period can run up to 31 May 2016, and the safeguard clause can be invoked until 31 May 2019.

19 Foreign trade – indicators: Balance of trade, (Swiss Confederation, 2012). Economists are used to acknowledge that trade has been key to the prosperity in Switzerland. Exports account for 50 per cent of its GDP (see: http://www.tradingeconomics.com/switzerland/exports).

- **Option 3: If negotiation fails, the European Community or Switzerland may terminate the agreement on free movement by notifying its decision to the other Party.[20] This can be done even in the absence of negotiations.**

The consequences of such unilateral denunciation will be particularly drastic for Switzerland. It will impact many other areas of cooperation largely beyond the issue of free movement.

According to the "guillotine clause" contained in Article 25(4), termination of the agreement on free movement will automatically trigger, within six months of its notification, the termination of the six other agreements concluded with the European Union. These agreements concern a broad range of different fields, such as agricultural products, air transport, road and rail carriage of passengers and goods, government procurement, and scientific and technological cooperation. Moreover, Swiss citizens would no longer benefit from free movement within the European Union.

One should further stress that even the radical option of terminating the free movement agreement will not be totally in line with the new constitutional provisions. Indeed, termination of a treaty is only valid for the future. Article 23 of the agreement further restates that its termination shall not affect the rights acquired by private individuals during the previous application of the free movement agreement. This means in substance that both EU and Swiss citizens already settled in the territory of the other Contracting Party are still protected despite the termination of the agreement.[21]

Conclusion

The popular initiative aimed at introducing immigration quotas has put Switzerland in a very difficult position. It will not only impact a broad range of treaties that Switzerland has ratified but also the country's political and economic stance generally. The ambiguity of the text submitted to popular vote was probably the main reason behind its approval by a slim majority. Thus, the adoption of a new legislation to implement Article 121a of the Swiss Constitution will be critical for clarifying the exact scope and limits of immigration quotas. However, the alternatives available to Switzerland are few. Needless to say, any choice between the different options open to Switzerland will be, above all, highly political. Against such a complex background, a new vote on a more precise text could even become a realistic alternative. ■

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20 Article 25(3) of the Agreements on the Free Movement of Persons.

21 Article 23 further provides that the European Union and Switzerland shall then settle by mutual agreement what action is to be taken in respect of acquired rights.